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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,
Appellant
v.
STATE OF GEORGIA,
Appellee

On Appeal from the Supreme Court of Georgia

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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APPENDIX

Opinion of the Supreme Court of Georgia in *Slaton* v. *Paris Adult Theatre I* (October 30, 1973).

IN THE

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APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellant Billy Jenkins submits this reply in opposition to Appellee State of Georgia's Motion to Dismiss or Affirm this appeal, and respectfully shows the following:

I.

This appeal raises substantial federal questions with respect to the validity of Georgia Code Ann. §26-2105.

Appellee contends, in the alternative, that Appellant did not challenge the constitutionality of Georgia Code Ann. §26-2105 in a timely and proper manner in the proceedings below; or, if he did, "there was no decision below upholding the constitutionality of the statutes in question"; or, if there was, no substantial federal questions are presented because the Supreme Court of Georgia's construction of §26-2105 was proper

under Georgia case law; or, as now construed, §26-2105 is constitutional in any case. (Motion to Dismiss or Affirm, pages 3-14.)

Appellee's contentions are clearly incorrect.

Throughout the proceedings below, Appellant expressly challenged the constitutionality of §26-2105 on its face and as applied to him. See Demurrer in the trial court (R. 4, 9); Appellant's Enumeration of Errors in the Supreme Court of Georgia (R. 3, 10-13); Appellant's Brief in the Supreme Court of Georgia (pages 5, 10-13).

When the Supreme Court of Georgia affirmed Appellant's conviction despite his challenge to the validity of §26-2105, "the federal question was decided and . . . its decision was essential to disposition of the case . . . ." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945). Whether the Court's construction of §26-2105 was permissible under Georgia case law is beside the point; the issue here is whether the Supreme Court of Georgia "incorrectly adjudge[d] federal rights."[1] *Ibid.* See also: *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282-283 (1932).

In the Jurisdictional Statement (pages 14-16), Appellant noted that the Supreme Court of Georgia's construction of §26-2105 in this case, now reported as *Jenkins* v. *State*, 230 Ga. 726, 199 S.E. 2d 183 (July 2, 1973) (hereinafter "*Jenkins*"), was subject to two possible interpretations, both of which raised substantial federal questions.

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[1] Including Appellant's right to due process of law. See Point II, *infra*.

In its Motion to Dismiss or Affirm (page 9), Appellee argues that one of these two possible interpretations is correct — namely, that the definition of obscenity contained in Georgia Code Ann. §26-2101(b) (the plurality *Memoirs* formulation)[2] is to be applied to films portraying the acts of "public indecency" encompassed by §26-2105, including a "lewd appearance in a state of partial or complete nudity" and a "lewd caress or indecent fondling of the body of another person."[3] If this interpretation is correct, Appellant continues to think it raises substantial federal questions as to the overbreadth of the portrayals of conduct to which §26-2105 applies.

However, any consideration of §26-2105 must now take into account the Supreme Court of Georgia's decision of October 30, 1973, in *Slaton* v. *Paris Adult Theatre I*, — Ga. —, — S.E. 2d — (Appendix AA) (hereinafter "*Paris*"), decided upon remand by this Court, *Paris Adult Theatre I* v. *Slaton*, — U.S. — (1973). Although *Paris* involved §26-2101(b) alone, it must necessarily have considerable impact upon §26-2105 as construed in this case.

As a result of *Paris*, it is unclear, for example, whether there are now one or two obscenity statutes in Georgia, and, if two, exactly how they differ. Whereas §26-2105 as construed in *Jenkins* might have continued to apply to certain acts of "public indecency," *Paris*

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[2] *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966) (plurality opinion).

[3] §26-2105 merely prohibits the portrayal in a motion picture of the acts which would constitute "public indecency" under Georgia Code Ann. §26-2011. The acts themselves are enumerated in §26-2011.

says that §26-2101(b) had been construed *in 1971* to apply to different acts — "acts of sexual intercourse, natural, unnatural, bizarre, and violent" and "actual sexual activity, both natural and unnatural" (App. AA, 6). Since *Jenkins* holds that the two statutes must be "construed together," it is impossible to determine whether §26-2105 now applies to the acts specified to constitute "public indecency," *or* to the acts to which *Paris* says §26-2101(b) has applied since 1971, *or* to both types of acts, *or* to any acts at all.

For further example, whereas *Jenkins* held that it was permissible to apply "local" community standards under §26-2105, *Paris* holds that the community standards to be applied under §26-2101(b) must be statewide in scope (App. AA, 8-9). Again, since the two statutes must be "construed together," it is now impossible to determine whether §26-2105 will, or must, be applied in accordance with "local" or statewide community standards.[4]

Under these circumstances, §26-2105 clearly fails to give persons of ordinary intelligence "fair notice" of exactly what it prohibits and, moreover, encourages arbitrary and erratic arrests and convictions. See, e.g., *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). And while this Court undertook in *Miller* v. *California*, — U.S. —, 5, 13 (1973),[5] "to formulate

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[4] In *Jenkins*, however, the Supreme Court of Georgia affirmed Appellant's conviction on the basis of its holding that it was proper to apply "local" community standards. Accordingly, the constitutional propriety of "local," as opposed to statewide, community standards continues to be an issue before this Court in this case.

[5] As in the Jurisdictional Statement, all page references em-

standards more concrete than those in the past" so that obscenity laws would "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution," the Supreme Court of Georgia's two post-*Miller* decisions — *Jenkins* (July 2, 1973) and *Paris* (October 30, 1973) — have led the law in Georgia, at least insofar as §26-2105 is concerned, in exactly the opposite direction.

II.

Appellant was denied due process of law in the proceedings below, including those in the Supreme Court of Georgia.

Appellant was accused[6] only of violating §26-2105, a statute which neither contains nor implies the concept of obscenity, and this accusation was binding upon the State.[7]

Nevertheless, the trial judge's instructions to the jury encompassed three separate and distinct statutory provisions, defining three separate and distinct offenses,[8] and the jury returned only a general verdict of guilty.

Appellee contends that, had Appellant given these

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ployed herein in connection with this Court's obscenity decisions of June 21, 1973, are to the slip opinions.

[6] The Jurisdictional Statement (page 5) erroneously stated that the accusation was returned by the Grand Jury of Dougherty County; actually, the accusation was returned merely upon signature of the District Attorney.

[7] See, e.g., *Wood* v. *State*, 219 Ga. 509, 134 S.E. 2d 8 (1963).

[8] See, e.g., *Campbell* v. *State*, 106 Ga. App. 588, 127 S.E. 2d 698 (1962); *Bennett* v. *State*, 108 Ga. App. 265, 132 S.E. 2d 816 (1963).

separate and distinct statutory provisions the "common sense reading which they demand," he would have known that they would be read and applied together. (Motion to Dismiss or Affirm, page 15.) Indeed, Appellee goes even further than the Supreme Court of Georgia expressly went and contends that §26-2101(c) ("pandering" or intent to pander) is to be read and applied together with §§26-2101(b) and 26-2105. (Motion to Dismiss or Affirm, page 19.)[9]

If a "common sense reading" demanded anything, it was that the three statutory provisions be read as defining three separate and distinct offenses. §§26-2101 and 26-2105 were passed by different legislatures — in 1968 and 1971, respectively — and have separate penalty provisions.[10] As of 1971, §26-2101(b) had already been construed to apply to portrayals of acts different from those encompassed by §26-2105 (App. AA, 5-6). The only possible "common sense reading" of §26-2105 on its face was that it "attempts to transfer the crime of public indecency into the motion pic-

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[9] Appellee contends that §26-2101(c) does not embody "pandering" concept, *cf. Ginzburg* v. *United States*, 383 U.S. 463 (1966), but rather expresses only an "added dimension" to be considered in determining whether material is obscene *per se*. Appellee does not specify what the nature of this "added dimension" might be. By so contending, Appellee only underscores the vague and overbroad manner in which §26-2105 may now be applied (See Point I, *supra*). In addition, if the Supreme Court of Georgia did implicitly so hold, it only emphasizes the completely unpredictable way in which §26-2105 was construed in this case.

[10] Under §26-2101(d) an initial violation of §26-2101 constitutes a misdemeanor but any subsequent violation shall constitute a felony, whereas, under §26-2105 both the initial and subsequent violations constitute only a misdemeanor.

ture art form" (Gunter, J., dissenting in *Jenkins*, Jurisdictional Statement, App. A, 14).

It was only on July 2, 1973, when the Supreme Court of Georgia affirmed his conviction, that Appellant knew or could have known that §§26-2101(b) and 26-2105 were to be "construed together." Since Appellant's "conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating," *Rabe* v. *Washington*, 405 U.S. 313, 315 (1972) (per curiam), he was clearly denied due process of law. See also: *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966); *Bouie* v. *City of Columbia*, 378 U.S. 347, 353-355 (1964).

III.

It is constitutionally impermissible to apply "local," as opposed to statewide, community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material.

Appellant would add here only that post-*Miller* decisions are in conflict as to whether the applicable community standards must be statewide in scope or whether a purely "local" standard may be applied. Accordingly, this issue should be resolved by this Court.

Some post-*Miller* decisions hold that the applicable community standards may be "local." See, e.g. *Rhodes* v. *State*, — So. 2d — (Supreme Court of Florida; Case No. 41,416; September 19, 1973); *Brazelton* v. *State*, 282 So. 2d 342, 343 (Ala. Ct. Crim. App., June 29, 1973). Others hold that the applicable community

standards must be statewide in scope. See, e.g., *State* v. *J-R Distributors, Inc.*, 512 P. 2d 1049, 1065 (Supreme Court of the State of Washington, July 27, 1973). And one court has even held that *both* statewide and "local" standards should be applied. *Richards* v. *State*, 497 S.W. 2d 770, 777 (Texas Ct. Civ. App., July 2, 1973).

Most strikingly, in Georgia there are now two post-*Miller* decisions by the State's highest court — *Jenkins* (July 2, 1973) and *Paris* (October 30, 1973) — which reach contradictory conclusions as to what community standards must or may be applied.

IV.

Whether the film "Carnal Knowledge" is obscene is an issue properly before this Court.

Whether a particular work may be suppressed as obscene is "a question of constitutional *judgment* of the most sensitive and delicate kind." *Roth* v. *United States*, 354 U.S. 476, 498 (1957) (opinion of Harlan, J.) (emphasis in original).

Yet Appellee takes the position that determinations of prurient interest appeal and patent offensiveness should be left to the jury, under proper instructions, and its finding should not be disturbed on appeal. (Motion to Dismiss or Affirm, pages 24-27)[11] Appel-

[11] Appellee's contention that the issue of obscenity was not raised in and passed upon by the Supreme Court of Georgia is clearly incorrect. The *Jenkins* majority expressly stated that it had affirmed Appelant's conviction only "After a review of the record and a viewing of the film . . . ." (Juris-

lee does not even mention the third requirement: that the work be "utterly without redeeming social value" (Georgia law) or lack "serious literary, artistic, political, or scientific value" (the *Miller* test).

Appellee's position thus flies squarely in the face of this Court's holding that appellate courts retain "the ultimate power . . . to conduct an independent review of constitutional claims when necessary." *Miller* v. *California*, supra at 10.

In answer to Appellee's phrasing of the question (Motion to Dismiss or Affirm, page 25), Appellant does not think a jury can "ever" properly determine that "Carnal Knowledge" is obscene,[12] for the film clearly possesses "serious literary, artistic, political, or scientific value."[13]

Indeed, it is Appellant's view that it would be particularly appropriate for this Court to determine the issue of obscenity in this case. For while this Court's obscenity decisions of June 21, 1973, were clearly and expressly directed only against "the public portrayal of hard core sexual conduct for its own sake," *Miller* v. *California*, *supra* at 20, there can be no doubt that those decisions "will have radiating consequences,

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dictional Statement, App. A, 1). In addition, the dissents make it clear that "This Court has conducted an independent review" (App. A, 11) and "an independent appellate review" (App. A, 16).

[12] The issue here is obscenity *per se*. This case does not involve exhibition to minors, "obtrusive" exhibition to unwilling persons, or "pandering."

[13] Nor does the film appeal to the prurient interest or portray sexual conduct in a patently offensive way.

and that these will be to encourage Comstockian tendencies." Bickel, *The Least Dangerous Branch* 140 (1962).

If such unintended "radiating consequences" are inevitable, and the Supreme Court of Georgia's decision in this case is proof that they are, the only way in which this Court can prevent their becoming the norm, rather than merely a temporary aberration, is to quickly and forthrightly declare that it did *not* direct its obscenity decisions of June 21, 1973, against a film like "Carnal Knowledge."

This Court has recognized that "the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public" undoubtedly has an effect on what films will be made and exhibited in the future. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 684 (1966). The fact that a film as serious as "Carnal Knowledge" has been held obscene by the Supreme Court of Georgia makes the risk of foreclosure not only very real but immediate, and, unless the judgment below is reversed, cannot help but have a significant impact on films which will be available to the public in the future — an impact, moreover, which goes far beyond what this Court intended. "The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor...." *Ibid.*

CONCLUSION

For the reasons set forth above, Appellee's Motion to Dismiss or Affirm should be denied, and the Judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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APPENDIX AA

IN THE

SUPREME COURT OF GEORGIA

Decided: October 30, 1973

26631 SLATON, Et Al.
v. PARIS ADULT THEATRE I, Et Al.

INGRAM, Justice. This case comes before the court again following decision and remand by the United States Supreme Court in Paris Adult Theatre I v. Slaton, 413 U. S. _____, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973). It began on December 28, 1970, when the District Attorney of the Atlanta Judicial Circuit and the Solicitor of the Criminal Court of Fulton County filed separate complaints in the Superior Court of Fulton County against Paris Adult Theatres I and II and certain named individuals, praying for a rule nisi to require the defendants to show cause why the motion picture films "It All Comes Out in the End," and "Magic Mirror" should not be declared obscene and enjoined from exhibition. A temporary restraining order was thereafter granted ex parte by the trial court restraining the defendants from destroying the films or removing them from the jurisdiction of the court pending a hearing. On January 31, 1971, *pursuant to the rule nisi, an adversary hearing was conducted in superior court during which the parties agreed to waive jury trial and a preliminary hearing and to submit the cause to the trial court for final determination and judgment.* The films were then exhibited to the trial court. The State offered no other

evidence at the hearing except for the testimony of the criminal investigators who had paid admission to see the films and who related that nothing on the outside of the theatres indicated the full nature of that which was shown, namely, scenes of simulated fellatio, cunnilingus and group sex intercourse.

After viewing the motion pictures and hearing the evidence, the trial court rendered the following judgment:

"The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are, 'It All Comes Out in the End,' and 'Magic Mirror'. Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

"It appears to the court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

"It is the judgment of this court that the films, even though they display the human body and the

human personality in a most degrading fashion, are not obscene.

"The actions against the defendants, therefore, are dismissed.

"This 12th day of April, 1971.

Jack Etheridge, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit."

On appeal from the above order, this court unanimously reversed the judgment of the trial court and held that the films were hard-core pornography and that the showing of these films should have been enjoined in that their exhibition to consenting adults was not protected by the First Amendment. *Slaton v. Paris Adult Theatre I*, 228 Ga. 343 (185 SE2d 768) (1971). The United States Supreme Court granted certiorari on June 26, 1972, and thereafter on June 21, 1973, vacated the judgment of this court and remanded the case for further proceedings not inconsistent with its opinions rendered in *Paris Adult Theatre I v. Slaton*, 413 U. S. _____, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973), and *Miller v. California*, 413 U. S. _____, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). See, also *United States v. 12 200-Ft. Reels of Super 8 mm Film*, 413 U. S. _____, 37 L. Ed. 2d 500, 93 S. Ct. 2665 (1973).

On August 27, 1973, we granted counsel for opposing sides and the Attorney General, leave to submit briefs to assist this court in assessing the effect of these opinions upon the earlier judgment of this court

and upon the legislative enactments of this State on obscenity.

I

OVERBREADTH

It is now firmly established that "obscenity" is not protected by the Free Speech Clause of the First Amendment and may be regulated by the State. *Miller v. California*, 413 U. S. ——, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973); *Roth v. United States*, 354 U. S. 476 (1957); *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942). In order to maintain the integrity of the First Amendment and to prevent incursions into areas of protected speech and expression, the United States Supreme Court has made it necessary, however, that regulatory statutes be carefully limited to define specific sexual conduct to whose depiction and description they apply. *Miller v. California*, 413 U. S. at ——, 37 L. Ed. 2d at 430, 93 S. Ct. at 2615 (1973). In *Miller* and in *United States v. 12 200-Ft. Reels of Super 8 mm Film*, 413 U. S. ——, 37 L. Ed. 2d 500, 93 S. Ct. 2665 (1973), the Court made clear that this statutory requirement could be met by specific legislation, as e.g. Oregon Laws 1971, c. 743, Art. 29 §§ 255-62 and Hawaii Penal Code, Title 37, § § 1210-16, and as well by authoritative judicial interpretation of legislation such as Ga. Code Ann. § 26-2101 (b) (Ga. L. 1968, pp. 1249, 1302).

In *Miller*, the Court settled upon minimal, factual guidelines for describing obscene material. The constitutional test was whether:

"(a) [T]he average person, applying 'contem-

porary community standards' would find that the work, taken as a whole, appeals to the prurient interest;

"(b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and,

"(c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."
Miller v. California, 413 U. S. at _____, 37 L. Ed. 2d at 431, 93 S. Ct. at 2615. In addition, with respect to part (b) of the above test, the Court gave examples of permissible statutory definition:

"(a) Patently offensive representations or depictions of ultimate sexual acts, normal or perverted, actual or simulated."

"(b) Patently offensive representations or depictions of masturbation, excretory functions, and lewd exhibition of the genitals."

The definition of obscenity under Georgia statutory law is as follows: "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters . . . ." Ga. L. 1968, pp. 1249, 1302, as amended; Ga. Code Ann. § 26-2101 (b). In the past, this court has defined and described conduct as obscene within the meaning of the Georgia statute in substantially the same language as that suggested by the Supreme Court in *Miller*. In *Evans Theatre Corp. v. Slaton*, 227 Ga.

377, 379 (180 SE2d 712) (1971), we dealt with depictions of "acts of sexual intercourse, natural, unnatural, bizarre, and violent." In *Walter v. Slaton*, 227 Ga. 676, 680 (182 SE 2d 464) (1971), the films were of "actual sexual activity, both natural and unnatural," which included sexual intercourse, fellatio and cunnilingus. For a similar description of obscene material, see *1024 Peachtree Corp. v. Slaton*, 228 Ga. 102 (184 SE2d 145) (1971). These decisions are, in effect, interpretations of that portion of the Georgia statutory definition providing that material "is obscene if . . . its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion . . ." Code Ann. § 26-2101 (b). These cases specifically "limit" the phrase they interpret, and a fair reading of them leads to the conclusion that the Georgia statute was designed to reach only "hard-core pornography," outside of First Amendment protection. *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 347 (185 SE2d 768) (1971). They reflect substantially the same descriptive language as that used in the examples of the Supreme Court in *Miller*: "Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . (and) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 314 U. S. ——, 37 L. Ed. 2d at 431, 93 S. Ct. at 2615.

We, therefore, conclude that the Georgia statute has been specifically delineated in a manner consistent with the new *Miller* standards. In rejecting counsel's constitutional challenge to the statute we therefore reaffirm our prior ruling that it is not overly broad or vague in definition. *Gornto v. The State*, 227 Ga. 46

(178 SE2d 894) (1970); see *Gable v. Jenkins*, 309 F. Supp. 998 (N. D. Ga. 1969), *aff'd. per curiam*, 397 U. S. 592 (1970) and noted in *Paris Adult Theatre I v. Slaton*, supra, 413 U. S. at _____, N. 1, 37 L. Ed. 2d at 453, N. 1, 93 S. Ct. at 2642, N. 1.

II

DUE PROCESS

The appellees contend that the Georgia statute as construed cannot be applied retroactively and that any detriment found in the *Miller* guidelines, as opposed to the prior *Memoirs* guidelines (Memoirs v. Massachusetts, 383 U. S. 413 (1966)), upon which Ga. Code Ann. § 26-2101 (b) is based, cannot be imposed upon them save in violation of due process of law.

The reply to this argument is that the Georgia statutory definition has been previously authoritatively construed by this court to include those standards for obscenity as permitted by *Miller*. In addition, the *Miller* guidelines allow a State to regulate material lacking in serious literary, artistic, political or scientific value, whereas under the *Memoirs* test (Ga. Code Ann. § 26-2101 (b)) the material also must be shown to be "utterly without redeeming social value." See *Jenkins v. State*, 230 Ga. 726 (SE2d) (1973). Thus, the *Memoirs* test, as construed to include standards offering greater protections to free speech and expression than those in *Miller*, is fully applicable to the pre-*Miller* defendant. See *United States v. Thevis*, No. 71-2614 (5th Cir., decided September 12, 1973); cp. *People v. Enskot*, 13 Cr. L. Rptr. 2522 (Cal. Ct. App. 2d Dist. August 8, 1973), and *United States v.*

1 Reel of Film, 481 F2d 206 (1st Cir. 1973). There can be no serious question that the appellees have been afforded the benefits of this, the *Memoirs*, test, and that their situation has not been substantially altered by the application of the standards of *Miller*, already prevailing in this State under statutory and decisional law.

In summary, this court has previously construed the statutory definition of obscenity in a manner authorized by the new *Miller* guidelines and therefore has not judicially enlarged Ga. Code Ann. § 26-2101 (b). The cases cited by the appellees which prohibit such practice, *Rabe v. State*, 405 U. S. 313 (1972), and *Bouie v. Columbia*, 378 U. S. 347 (1964), are not in point. There has been no unconstitutional, subsequent, contraction of an overly-broad statute to save its application retroactively. cp. *Cox v. New Hampshire*, 312 U. S. 569 (1941), and *Shuttlesworth v. Birmingham*, 394 U. S. 147 (1969).

III

STANDARDS

In *Miller v. California*, supra, the Supreme Court clarified the "community standards" to which the obscenity guidelines were to apply, disavowing that of the nationwide community in favor of that of the state. 413 U. S. at _____, 37 L. Ed. 2d at _____, 93 S. Ct. at 2618-20. In view of *Miller* and of the constitutional responsibility placed upon this court to conduct independent appellate determinations of the issue of obscenity *vel non*, we hold the "community" by

which the standards for obscenity are gauged is that community or polity which is the State of Georgia.

Secondly, it is also no longer necessary in cases where the materials themselves are available for inspection by the finder of fact that expert testimony be produced on behalf of the prosecution. *Paris Adult Theatre I v. Slaton*, 413 U. S. at _____, 37 L. Ed. 2d at 456, 93 S. Ct. at 2634. See, also, *United States v. Groner*, 479 F2d 577 (5th Cir. 1973).

Thirdly, the Supreme Court has rejected the ruling of the trial court in *Paris Adult Theatre I v. Slaton*, supra, that exhibition of obscene material or film to consenting adults is constitutionally permissible. The Court stated, "We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. This holding was properly rejected by the Georgia Supreme Court." 413 U. S. at _____, 37 L. Ed. 2d at _____, 93 S. Ct. at 2635.

And finally, under the standards announced by the Supreme Court in *Miller*, inhering in prior judicial decisions of this court, and taken in conjunction with Ga. Code Ann. § 26 - 2101 (b), the basic guidelines for determining whether materials or films are obscene in Georgia may be stated substantially as follows:

Applying contemporary community standards and considering the material or film as a whole, the average person would find:

(a) its predominant appeal is to a prurient interest in sex;

(b) the material or film is a patently offensive depiction or description of sexual conduct, embodying a shameful or morbid interest in nudity, sex or excretion, and going substantially beyond customary limits of candor in describing or representing such matters;

(c) the material or film taken as a whole lacks serious literary, artistic, political or scientific value; and,

(d) the material or film taken as a whole is utterly without redeeming social value.

IV

CONCLUSION

In the instant case, the films "It All Comes Out in the End" and "Magic Mirror" depicted actors cavorting indiscriminately in the nude, in a manner designed to appeal to the prurient interests; they depicted simulated acts of intercourse and fellatio. This court has already found these films obscene. In *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 347 (185 SE2d 768) (1971), we said: "The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character."

We affirm our original decision. The court has again conducted an independent appellate review of the films, and they have been exhibited to those members of the court now sitting who did not participate in the prior ruling. These members have likewise

concluded that the films are obscene under the above standards. The judgment of the trial court is, therefore, reversed with direction that it enter an order permanently enjoining the exhibition of the films.

Judgment reversed with direction. All the Justices concur.

In the Supreme Court of Georgia

26631. SLATON, et al.
v. PARIS ADULT THEATRE I, et al.

GUNTER, Justice (concurring specially). I concur in the Court's judgment of reversal today solely because I consider that I am bound by the majority decisions of the Supreme Court of the United States in Paris Adult Theatre I v. Slaton, supra, and Miller v. California, supra, rendered June 21, 1973.

Were it not for those two recent decisions I would hold that the Georgia statute (Code § 26 - 2101) which permits the State to suppress "obscene materials" is vague and overly broad so as to be constitutionally unenforceable.

While I do not consider the First Amendment to be absolute, it is my view that First Amendment proscriptions, made applicable to Georgia by the Fourteenth Amendment, do not permit the State to suppress expression unless such suppressed expression is clearly defined by the State so that a reasonable man can see the line of demarcation between protected expression and suppressed expression. The definition of "obscene materials" that may be suppressed by the State, con-

tained in the present Georgia statute, does not, to my mind, come even close to establishing that line of demarcation. A reasonable man or, for that matter, seven supposedly reasonable judges, utilizing objective criteria which in the last resort end up being really subjective criteria, cannot distinguish constitutionally protected material from material that is unprotected by the First Amendment.

The net result of the Miller (obscenity concept) case is that this Court acts as a seven-man board of censors in the state of Georgia, and the Supreme Court of the United States acts as a nine-man board of censors throughout the nation, with a majority of this Court determining what is constitutionally protected or unprotected in Georgia and a majority of the Justices of the Supreme Court of the United States determining what is constitutionally protected or unprotected at the national level. As Mr. Justice Brennan so aptly put it in his dissenting opinion in Paris Adult Theatre I: "The problem is, rather, that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." See also the decision of this Court in Jenkins v. The State, Ga. , SE 2d (1973).

However, because of the majority decisions in Miller v. California and Paris Adult Theatre I v. Slaton, supra, I am required to hold that the present Georgia statute defining obscene material that may be suppressed by the State is not a constitutionally vague and over broad statute.

I therefore concur in the judgment of reversal.

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of this Appellant's Reply to Appellee's Motion to Dismiss or Affirm upon counsel for Appellee, Mr. Carter Goode, Fulton County Courthouse, Atlanta, Georgia 30303, and Mr. Tony H. Hight, Suite 406, 501 Pulliam Street, Atlanta, Georgia 30312, by depositing copies of said Appellant's Reply to Appellee's Motion to Dismiss or Affirm in the United States Mail properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served.

This .... day of November, 1973.

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